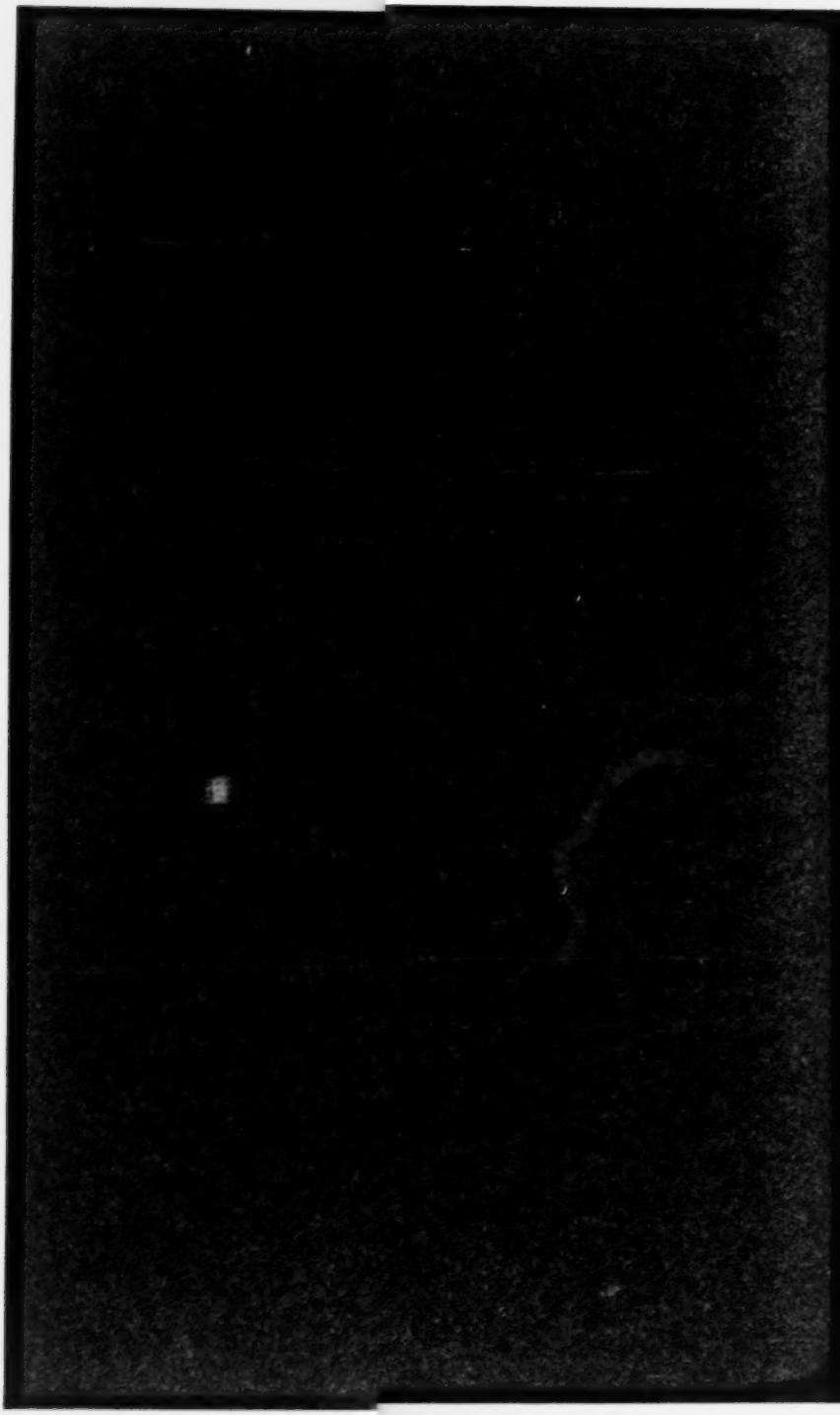

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS AND HOWARD FIRE BRICK COMPANY and Union Land and Material Company, appellants,
v.
THE UNITED STATES.
No. 567.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS.

The Solicitor General on behalf of the United States respectfully moves that this appeal be dismissed.

The appeal is from an order of the United States District Court for the Eastern District of Missouri, entered June 20, 1914, denying the petitions of the appellants for leave to intervene and for a modification of the final decree theretofore entered by that court in the case of *United States* v. *Terminal Railroad Association of St. Louis et al.*, a suit under the antitrust act of July 2, 1890. (R. 31.)

The petitions in question were filed on June 20, 1914. (R. 21–28.) Long prior to that date, to wit,

on March 27, 1914, the United States had duly perfected an appeal to this court from the aforesaid final decree, assigning as error the failure of the District Court properly to carry out the opinion and mandate handed down by this court at the October Term, 1911. (R. 35-39.)

It is thus apparent on the face of the record that at the time appellants' petitions were filed the District Court was wholly without power or authority to make any order affecting or modifying the decree, for the reason that the jurisdiction of this court had attached and become exclusive through the perfecting of an appeal by the United States.

That the jurisdiction of an appellate court becomes complete and that of the trial court ceases at the time an appeal or writ of error is perfected, is elementary. *Bronson* v. *La Crosse R. R. Co.*, 1 Wall. 405, 409; *Brooks* v. *Norris*, 11 How. 203; *Keyser* v. *Farr*, 105 U. S. 265; *The "S. S. Osborne,"* 105 U. S. 447, 450; *Ensminger* v. *Powers*, 108 U. S. 292; *Roemer* v. *Simon*, 91 U. S. 149; *Hovey* v. *McDonald*, 109 U. S. 150, 157; *Burnham* v. *North Chicago Street Ry. Co.*, (C. C. A. 7th C.), 87 Fed. 168; *Morrin* v. *Lawler*, (C. C. E. D. N. Y.), 91 Fed. 693. Therefore after a writ of error or appeal has been perfected the lower court is without power to modify its judgment or decree.

In *Roemer* v. *Simon*, 91 U. S. 149, the Chief Justice, in denying a motion, made after an appeal had been taken to this court, to set aside the decree

of the court below and grant a rehearing, said (p. 150):

> * * * It would be useless to remand this cause, * * * as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing *and have that court send to us a request for a return of the record, in order that it might proceed further with the cause.* Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order. * * * (Italics ours.)

In *Ensminger* v. *Powers,* 108 U. S. 292, in deciding that the period during which an appeal was pending in this court should not be counted against the appellant in ascertaining whether her bill of review was filed in time, this court said (p. 302):

> * * * The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged. * * * *While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control.* (Italics ours.)

In *Citizens' Bank of Wichita* v. *Farwell,* 56 Fed. 539, the Circuit Court of Appeals for the Eighth Circuit, in dismissing a writ of error sued out to

review an order of the trial court overruling a motion to set aside the judgment while a previous writ of error was pending, said:

> * * * The removal of the case into this court under the first writ of error transferred the jurisdiction of the suit to this court, and the jurisdiction of the lower court over the case was at an end.

In *First National Bank* v. *State National Bank* (C. C. A. 9th C.), 131 Fed. 430, the court said (p. 431):

> * * * The overwhelming weight of authority of the State courts is that an appeal, properly perfected, absolutely removes the case from the trial court and places it in the appellate tribunal. The case must, of necessity, either be in the appellate or lower court. It can not very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction.

In *Morrin* v. *Lawler* (C. C. E. D. N. Y.), 91 Fed. 693, it was said (p. 694):

> * * * When all the steps necessary to perfect an appeal to an appellate court have been properly taken, the action is within the control of that court, and the trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained.

See, also, *Morgan's Louisiana & T. R. & S. S. Co.* v. *Texas Cent. Ry. Co.* (C. C. Tex.), 32 Fed. 525, 530 (opinion by Mr. Justice Harlan); and *Kimberly* v. *Arms* (C. C. Ohio), 40 Fed. 548, 550.

Further, the case in which the final decree sought to be modified was rendered, namely, *United States* v. *Terminal Railroad Association of St. Louis et al.*, is now pending in this court, being No. 452, October Term, 1914; and therefore, if the ends of justice require their presence, this court under section 5 of the antitrust act has full power to permit or order the appellants to appear and be heard on any question affecting their rights.

Wherefore it is submitted that it is apparent on the face of the record that this appeal is irregular, frivolous, and useless and should be dismissed.

JOHN W. DAVIS,
Solicitor General,
EDWARD C. CROW,
Special Assistant to the Attorney General.

SEPTEMBER, 1914.

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Supreme Court, U. S.
FILED
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No. 567.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

EVANS AND HOWARD FIRE BRICK COMPANY, AND UNION SAND & MATERIAL COMPANY, APPELLANTS

vs.

THE UNITED STATES, RESPONDENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS ON MOTION OF UNITED STATES TO DISMISS THEIR INTERVENING PETITIONS.

GEORGE M. BLOCK,
JOHN F. LEE,
Solicitors for Appellants.

No. 567.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS ON MOTION OF UNITED STATES TO DISMISS THEIR INTERVENING PETITIONS.

These appellants, in answer to the motion to dismiss filed herein, state that their appeal is not "irregular, frivolous or useless," as stated in said motion, and ought not to be dismissed as prayed therein. That the

District Court, from which the appeal herein is taken, erred in refusing to permit appellants to intervene in said Court in the above entitled cause for the reasons stated in points 1, 2 and 3 of the statement, brief and argument of appellants filed in this court and set forth respectively on pages 16, 18 and 21 of their said statement, brief and argument filed herein, and that these appellants were entitled to intervene in said District Court in said cause because

First. Rule 37 of this Court provides in part, as follows:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention."

Second. Section 5 of the Anti-Trust Act of the United States provides in part, as follows:

> "Whenever it shall appear to the Court before which any proceeding under Section 4 of this Act may be pending that the ends of justice require that other parties should be brought before the Court, the Court may cause them to be summoned."

Said appellants aver that if they had no right to intervene in said District Court, either under said Rule 37 or said Section 5, they have a right under both said rule and said section to appear and be made parties to this cause if this Court shall so order. That even if the foregoing were not true, this Court will recognize that the appellants and the fifty-three other intervenors who appeared with them in the District Court, and who sought the same relief sought by these appellants, constitute a portion of the public vitally interested

in the decree rendered in the cause of United States against the St. Louis Terminal Association, but not made parties in that cause or in any default in attempting to secure a correction of said decree and are therefore entitled to appear and be heard in this Court, by counsel as amici curiae.

Respectfully submitted,

Thomas Bond

John F. Lee

Solicitors of said Appellants.